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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 26

ABRAHAM C. BERMAN,

Petitioner,

against

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

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Attorney for Petitioner.

SAMUEL H. KAUFMAN,
EMIL WEITZNER,
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Of Counsel.

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IN THE

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OCTOBER TERM, 1937

No. 26

ABRAHAM C. BERMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Nature of the Proceedings.

This is a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit (R. 39), which (1) dismissed petitioner's appeal from a sentence of imprisonment imposed by the United States District Court for Southern New York on December 29, 1936, the execution of which was suspended at the time of its pronouncement when the petitioner was placed upon probation for two years (R. 1, 11); (2) dismissed the petitioner's appeal from a resentence on January 28, 1937, by the same court for the same term of imprisonment, which again

placed petitioner on probation for two years, and which, in addition, imposed a nominal fine, payment of which was stayed pending appeal (R. 13, 14, 28), the dismissal being limited to the petitioner's appeal from that part of the resentence which imposed a term of imprisonment and placed the petitioner on probation for two years; and (3) affirmed, summarily, and without a hearing upon the merits of the appeal, the resentence insofar as it imposed a fine, although the petitioner had appealed from the resentence as a single judgment.

Opinions Below.

The District Court rendered no opinion.* The *per curiam* opinion of the Circuit Court of Appeals (R. 37) is reported in *United States* v. *Berman,* 88 F. (2d) 645.

Jurisdiction.

The date of the judgment of the Circuit Court of Appeals sought to be reviewed is March 8, 1937 (R. 39). The petition for writ of certiorari was filed on April 12, 1937, and was granted on May 17, 1937 (R. 44), the Solicitor General not opposing the granting of the petition. This court has jurisdiction to review the judgment below under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

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* The minutes of the hearing in the District Court upon resentencing of the petitioner have been certified by the clerk of the District Court and are printed in the Record at pages 40-44.

Statutes and Rules Involved.

The statutes and rules involved are: Sections 128 and 135 of the Judicial Code (U. S. C. Title 18, secs. 225, 230), relating to appeals from the District Court to the Circuit Court of Appeals; the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934 pursuant to the Act of February 24, 1933, c. 119, U. S. C. Title 28, Sec. 723(a); and the Federal Probation Act, Act of March 4, 1925, c. 521, as amended, U. S. C., Title 18, Secs. 724-727. These statutes and rules are set forth in an Appendix *infra*, pages 32-40.

Statement of the Case.

On December 23, 1936, the petitioner, a lawyer,* was found guilty by a jury in the United States District Court for Southern New York upon an indictment charging him with the crime of using the mails in a scheme to defraud, in violation of Section 338, Title 18, of the United States Code (U. S. Criminal Code, Sec. 215), and the crime of conspiracy to do so in violation of Section 88, Title 18, of the United States Code of Laws (U. S. Criminal Code, Sec. 37) (R. 8, 30, 34).

On December 29, 1936, the court sentenced the petitioner to imprisonment for the term of one year and a day on each of the counts upon which he had been found guilty, to run concurrently on all counts, and at the same time suspended execution of the sentence and placed the petitioner on probation for a period of two years (R. 11, 30, 31, 34). Judg-

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* Disbarred in consequence of his conviction in the instant cases (N. Y. Judiciary Law, Section 88(3); *Matter of Berman*, 250 App. Div. 380, 294 N. Y. Supp. 429.

ment of conviction was on the same day entered in the office of the Clerk of the District Court (R. 11).

On December 30, 1936, petitioner duly filed his notice of appeal from said judgment of conviction (R. 13, 14, 25, 34).

After imposition of sentence, and the filing of notice of appeal, petitioner's counsel had brought to his attention decisions of the Circuit Court of Appeals for the Second Circuit holding that where *imposition* of sentence is suspended by the District Judge, no appeal will lie (*U. S.* v. *Lecato,* 29 F. (2d) 694; *U. S.* v. *Messina,* 36 F. (2d) 699; *U. S.* v. *Levinson,* 54 F. (2d) 363; *U. S.* v. *Knickerbocker Fur Coat Co.,* 66 F. (2d) 388; *U. S.* v. *Vigorito,* 67 F. (2d) 329). Fearful lest those decisions be extended to include the petitioner's case, although sentence had actually been imposed upon him and only its execution suspended, petitioner made application to the District Judge for resentence (R. 31-32, 40-41).

When informed of the decisions of the Circuit Court of Appeals cited above the District Judge stated that had they been called to his attention at the time of sentence he would then have imposed as part of the sentence, a fine of $1 on each of the counts upon which the petitioner had been found guilty, so as to assure to him the right of appeal (R. 32, 42-44). He thereupon resentenced the petitioner to a year and a day upon each of the counts, to run concurrently, suspended execution thereof, placed the petitioner on probation for a period of two years, and imposed a fine of $1 on each of the counts, with stay of payment of the fine pending appeal (R. 28, 32, 34, 44).

The second judgment of conviction was entered in the office of the Clerk of the District Court on January 28, 1937 (R. 28, 32, 34). On February 1, 1937, the petitioner filed

his notice of appeal from said second sentence (R. 29, 32, 35).*

Counsel for the United States attended before the District Judge upon the application for resentence and opposed the resentence, solely on the ground that the pendency of an appeal from the judgment of conviction entered December 29, 1936, deprived the District Court of jurisdiction to resentence. He made no objection to the imposition of the fine as part of the resentence to insure the petitioner against a holding that the first sentence was non-final, but contended that if a resentence were to be pronounced the appeal from the original sentence should first be withdrawn and the original sentence vacated (R. 36, 41-43). This procedure petitioner declined to accept, lest it be held that the five days within which an appeal is required to be taken under Rule III of the Rules of Practice and Procedure in Criminal Cases be held to be computable from December 29, 1936, the date on which the first sentence was imposed (R. 37, 43).

On February 2, 1937, petitioner moved in the Circuit Court of Appeals for the Second Circuit to consolidate the appeals taken on December 30, 1936 and February 1, 1937 (R. 29-32). On February 5, 1937, the United States made a cross motion to dismiss the first appeal on the ground that it was

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* By order of the District Court, Petitioner's time to file his assignment of errors in the District Court and to present his bill of exceptions to the trial judge for settlement was on January 28, 1937 duly extended to and including April 15, 1937 (R. 29, 34). Immediately after resentence, the petitioner, as a matter of caution, obtained a second order again extending his time to and including April 15, 1937, on which date the bill of exceptions was signed by the trial judge and filed.

taken from a suspended sentence, or, alternatively, to dismiss the second appeal because the District Court lacked jurisdiction to enter the same (R. 33-37). While it prayed for general relief, the United States did not suggest that the second judgment of conviction be affirmed upon the ground that petitioner had consented thereto, or upon any other ground (R. 35-37).

On March 1, 1937, the Circuit Court of Appeals, in a *per curiam* opinion, dismissed the first appeal, dismissed the second appeal insofar as it was taken from the resentence of imprisonment, and affirmed the second judgment of conviction, insofar as it imposed a fine (R. 37).

The Circuit Court of Appeals held that the first sentence was interlocutory because of the suspension of its execution and that, therefore, there had been no final decision, within the meaning of Section 128 of the Judicial Code, from which the petitioner might appeal. The Circuit Court of Appeals in so holding, relied upon the authority of its prior decisions that no appeal might be taken where *imposition* of sentence had been suspended. The difference between suspension of imposition of sentence and suspension of execution of a sentence imposed, was held to be a difference "in form only." The suspension of execution of sentence and the placing of the petitioner upon probation, was held not to be "really a stay", on the ground that the termination of the suspension was not dependent upon "the occurrence of some outside condition * * * over which the [trial] judge has no control." The sentence, "though definite," was said to remain "conditional," because its execution "depends upon another decision of the judge." In so holding, the Circuit Court of Appeals overruled the petitioner's contention that the first sentence was a final decision, and that the suspension of

the execution thereof and the placing of defendant upon probation, did not render it non-final.

As to the second sentence the Circuit Court of Appeals held that it was comprised of two separable parts, *i.e.*, one part reimposing imprisonment and again suspending execution thereof and placing the petitioner on probation, and the other part imposing a fine. The Circuit Court of Appeals in effect, also held that the appeal itself from the second sentence was comprised of two parts, *i.e.*, an appeal from a sentence of imprisonment and an appeal from the imposition of a fine. In so holding, the Circuit Court of Appeals overruled petitioner's contention that the second sentence was a single judgment of conviction and could not be treated, in effect, as two judgments, and that the appeal from the second sentence could be treated only as a single appeal from that single judgment.

Insofar as the second appeal was held to be from a sentence imposing imprisonment, the Circuit Court of Appeals held that it was an appeal from a non-final decision.

Insofar as the second appeal was held to be taken from the portion of the sentence imposing a fine, the Circuit Court of Appeals held it to be an appeal from a final decision, but an appeal from a judgment of which the petitioner might not complain "because he not only consented to it, but actually asked for it." This portion of the judgment appealed from the Circuit Court of Appeals held, therefore, should be affirmed without inquiry into the errors urged as requiring a reversal of the judgment of conviction. In so holding, the Circuit Court of Appeals overruled the petitioner's contention that he had not consented to the imposition of the fine; that the imposition of the fine had been determined by the trial judge in the exercise of his discretion and in order to assure petitioner an appeal upon the merits of his

conviction; that the petitioner in no way acquiesced in the judgment of conviction nor waived his right of appeal, and that the Circuit Court of Appeals was without authority in law to affirm the judgment of conviction without considering the merits of the appeal taken by the petitioner.

The Questions Presented.

The Solicitor General has conceded that if the first judgment was a final decision from which an appeal lay, the District Court was without power, because of the pendency of an appeal from the first judgment, to enter a second judgment.* See *Keyser* v. *Farr*, 105 U. S. 265; *United States* v. *Mayer*, 235 U. S. 55, 70; *Midland Terminal Ry. Co.* v. *Warinner*, 294 F. 185 (C. C. A. 8); *Levinson* v. *United States*, 32 F. (2d) 449 (C. C. A. 6); *United States* v. *Habib*, 72 F. (2d) 271 (C. C. A. 2); *Tinkoff* v. *United States*, 86 F. (2d) 868 (C. C. A. 7); *Simmons* v. *United States*, 89 F. (2d) 591 (C. C. A. 10). If, therefore, as petitioner submits, the first judgment was a final decision, the second judgment should have been reversed on the ground that it was entered without jurisdiction. *Blacklock* v. *Small*, 127 U. S. 96; *Whittemore* v. *Amoskeag Bank*, 134 U. S. 527; *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.*, 51 Fed. 929, 930-931 (C. C. A. 1; opinion by Mr. Justice Gray); *United States* v. *Radice*, 40 F. (2d) 445, 446 (C. C. A. 2).

The principal question presented, therefore, is:

Where a court of the United States having original jurisdiction in a criminal action, after sentencing a defendant

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* Memorandum for the United States on petition for certiorari, page 1.

after conviction, has suspended the execution of sentence and placed the defendant upon probation for a specified period in the exercise of the power vested in it by the Probation Act, because it appears to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, must the defendant, in order to secure the right to appeal under Section 128 of the Judicial Code, insist that he nevertheless be committed to imprisonment.

More specifically, where, in the exercise of the power vested in it by the Probation Act, the District Court imposes a sentence for a definite term and suspends execution of the sentence and places the defendant upon probation, is the sentence "a final decision" from which an appeal may be taken to the Circuit Court of Appeals under Section 128 of the Judicial Code. That is, was it the intention of the Congress, in enacting the humanitarian provisions of the Probation Act, thereby to redefine the term "final decision" in Section 128 of the Judicial Code so as to retain within that term a sentence the execution of which had been stayed pending appeal, but to exclude a sentence the execution of which had been stayed during probation.

Only if it be held that no final decision results from a sentence of imprisonment the execution of which has been suspended and the defendant placed on probation, is the following additional question presented:*

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* The Circuit Court of Appeals assumed, *arguendo*, "that since the first sentence was a nullity, the district court still had jurisdiction" to vacate the first judgment and that therefore, the second judgment should be construed as vacating the first, else such second judgment would be clearly invalid."

Where the defendant has suggested to the district judge, after appeal from a prior sentence, execution of which was suspended under the Probation Act, that the Circuit Court of Appeals might extend the application of earlier decisions so as to hold that no appeal lay from such prior sentence, and where the district judge, in order to assure to the defendant the right of appeal, resentenced the defendant to the same term of imprisonment (again suspending execution of sentence under the Probation Act) and imposed a fine to be paid, may the Circuit Court of Appeals, upon an appeal from such second sentence, affirm the same insofar as it imposed a fine, without consideration of the merits of such appeal.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that a judgment of conviction entered upon the verdict of a jury, imposing a sentence of imprisonment, execution of which is suspended, the defendant being placed on probation, is not a final decision, and that therefore no appeal may be taken therefrom.

2. The Circuit Court of Appeals erred in dismissing the appeal from the judgment of conviction entered in the District Court on December 29, 1936.

3. The Circuit Court of Appeals erred in holding that the judgment of conviction entered in the District Court on January 28, 1937 was, in effect, a judgment in two separable parts.

4. The Circuit Court of Appeals erred in holding that the appeal from the judgment of conviction entered in the Dis-

trict Court on January 28, 1937 constituted, in effect, two separable appeals.

5. The Circuit Court of Appeals erred in dismissing the appeal from the judgment entered in the District Court on January 28, 1937, in so far as it imposed a sentence of imprisonment, execution of which was suspended during the defendant's probation.

6. The Circuit Court of Appeals erred in holding that the petitioner consented to the judgment of conviction entered in the District Court on January 28, 1937, in so far as said judgment imposed a fine.

7. The Circuit Court of Appeals erred in holding that the petitioner might not complain of the judgment entered in the District Court on January 28, 1937, in so far as said judgment imposed a fine upon petitioner.

8. The Circuit Court of Appeals erred in affirming the judgment entered in the District Court on January 28, 1937, in so far as said judgment imposed a fine upon the petitioner.

9. The Circuit Court of Appeals erred in refusing to consider upon the merits and as a single appeal from a single judgment, the appeal taken from the judgment entered in the District Court on January 28, 1937.

Argument.

I.

The judgment of conviction entered on December 29, 1936, imposing a sentence of imprisonment, execution of which was suspended, the defendant being placed upon probation, was a final decision from which an appeal lay.

a.

Section 128(a) of the Judicial Code provides that "the circuit courts of appeals shall have appellate jurisdiction to review by appeal or writ of error *final decisions* * * * in the district courts, in all cases save where direct review of the decision may be had in the Supreme Court * * *." Under Section 135 of the Judicial Code such appeals were required to be taken within three months after "the entry of such judgment." The Act of February 24, 1933, c. 119 (U. S. C. Title 28, sec. 723(a)) provides that this Court "shall have power to prescribe, from time to time, rules of practice and procedure with respect to any and all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in the district courts of the United States * * *." It also provides that "the right of appeal shall continue in those cases not authorized by law but the rules as herein authorized may prescribe the time for and manner of taking appeals * * *."

The authorization to this Court to prescribe rules of procedure and practice was obviously not intended to affect, either by way of enlargement or diminution, the right of appeal. Consequently, the petitioner's right of appeal from the first judgment, by which he was sentenced to imprison-

ment and execution of the sentence suspended and the petitioner placed upon probation, depends upon whether such judgment was a "final decision" within the meaning of Section 128(a) of the Judicial Code.*

Nevertheless the Congressional authorization to this Court and the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court pursuant to that authority, are both of significance. The language of the statute is broad and comprehensive. Equally so are the Rules of Practice and Procedure. Rule III provides that:

> "An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision two (2) of rule II, the appeal may be taken within five (5) days after entry of the order denying the motion."

The conclusion is inescapable that this Court has thus declared that the judgment of conviction in a criminal case is always a final decision, within the meaning of Section 128 of the Judicial Code. It has, indeed, recently said in a criminal appeal that in criminal cases "the sentence is the judgment." (*Hill, Warden,* v. *U. S., ex rel. Wampler,* 298 U. S. 460, 464.)

Rule II of the Rules of Practice and Procedure leaves no doubt that in speaking of the entry of "judgment of conviction", this Court referred to the sentence. Under Rule II, a motion for a new trial upon the ground of newly discovered

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* Indeed, in at least two instances prior to the promulgation by this Court of the Rules of Practice and Procedure in Criminal Cases, precisely the question mooted in the instant case was presented by appeals to Circuit Courts of Appeals. And in both instances the appeals were heard. *Davis* v. *United States,* 55 F. (2d) 550 (C. C. A. 5); *Aycock* v. *United States,* 62 F. (2d) 612 (C. C. A. 9). See page 21, *infra.*

evidence may be "made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered."

b.

Under the decision of the Circuit Court of Appeals in the instant case, the judgment of conviction becomes a final decision only when the suspension of execution of sentence is terminated. Then, for the first time, would the right of appeal accrue to the defendant under Section 128 of the Judicial Code, though years may have intervened since sentence was first imposed. Thus to permit appeals long after judgment of conviction, would be to override the will of Congress, as expressed in Section 135 of the Judicial Code, requiring that appeals to the Circuit Court of Appeals be taken within three months after entry of judgment,—a period drastically reduced to five days in criminal cases by Rule III of the Rules of Practice and Procedure.

The Congress and this Court intended to avoid delay in the final determination of criminal cases. (See *Ray* v. *United States*, 301 U. S. 158; see also *LaBelle* v. *United States*, 86 F. (2d) 911 (C. C. A. 7).) It cannot reasonably be said that they intended to accomplish this result only in certain criminal cases, but were content to allow years of delay where execution of sentence was suspended in the interim for reasons of justice. Such delay not only is irreconcilable with respect for the administration of criminal law, but threatens the very administration itself, for in the months and years of delay witnesses vital to the prosecution will frequently, in the normal course of events, become unavail-

able.* (*Cf. Mariano* v. *Hibbard,* 243 Mass. 90, 137 N. E. 369).

It has been recognized not only by the Circuit Courts of Appeals for the Sixth Circuit (*Evans* v. *District Judge,* 12 F. (2d) 64), the Seventh Circuit (*Kriebel* v. *United States,* 10 F. (2d) 762; *Trant* v. *United States,* 90 F. (2d) 719), and the Ninth Circuit (*Nix* v. *James,* 7 F. (2d) 590), but also by the Circuit Court of Appeals for the Second Circuit (*Ackerson* v. *United States,* 15 F. (2d) 268)**, that a defendant not actually committed to imprisonment, may, even after exhausting his appeal, apply to the trial judge to be placed upon probation.

Whether the decision in the instant case is technically in conflict with the decision of the same court in *Ackerson* v. *United States, supra,* and the cited decisions of the Sixth, Seventh and Ninth Circuits, is unimportant. If the decision in the instant case is permitted to stand, defendants, convicted by a jury, who desire to appeal will be compelled to ask that consideration of the suspension of execution of sentence be deferred until the disposition of their appeals; and trial judges may decline to suspend execution of sentence

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* The holding of the Circuit Court of Appeals would have another, and hardly less unfortunate consequence. The effect of the decision would be to extend indefinitely the time within which a motion for a new trial might be made upon the ground of newly discovered evidence.

** Accord: *United States* v. *Gargano,* 52 F. (2d) 723 (D. C., La.); accord, also, are all of the state cases: *Lloyd* v. *Superior Court,* 208 Calif. 622, 283 Pac. 931; *State ex rel. Gentry* v. *Montgomery,* 317 Mo. 811, 297 S. W. 30; *State ex rel. Bottomly* v. *District Court,* 73 Mont. 541, 237 Pac. 525; *People ex rel. Woodin* v. *Ottaway,* 247 N. Y. 493, 161 N. E. 157.

where such suspension will deprive the defendant of the desired opportunity to appeal. Orderly administration of the criminal law will not be subserved by such practice which must inevitably develop in order to preserve the power to determine whether the ends of justice and the best interests of the public, as well as the defendant, will be served by suspending execution of sentence and placing the defendant upon probation. The lapse of time between imposition of sentence and consideration of the question of probation will result, not only in the loss of the advantage in having the question of probation considered by a trial judge who has recently heard the evidence, but will increase the possibility that the trial judge will have become unavailable."*

In *Burns* v. *United States,* 287 U. S. 216, 222, this Court remarked upon the necessity for a construction of the Probation Act under which it might not "be made the occasion of delays and obstruction which would bring reproach upon the administration of justice." That *caveat* the decision in the instant case completely neglects. The decision of the Circuit Court of Appeals in the instant case gravely threatens the efficient administration of the criminal law in the courts of the United States.

c.

The utter perversity of the decision of the Circuit Court of Appeals in the instant case is demonstrated by the fact that it denies to one maintaining his innocence the right to appeal, unless he insists upon *imprisonment,* while those the

* Inconvenience and delay, would doubtlessly result where the trial judge has sat in the case under a special assignment away from his home district.

fairness of whose trial has been confirmed by appeal may still seek dispensation under the Probation Act.

Such a construction of the Probation Act is entirely contrary to and inconsistent with the spirit of the Probation Act. By that legislation, the trial judge is empowered to suspend execution of sentence where it appears to his satisfaction that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby. Under the decision of the Circuit Court of Appeals, the trial judge, if he believed, as the trial judge in the instant case believed, that the defendant should be given every opportunity to appeal, would have to set at naught considerations of justice and the interests of the public and of the defendant and actually order the defendant committed to prison in order that he might have the benefit of an appeal. It is a perversion of the purposes of Congress thus to set in opposition the right to appeal and considerations of justice and equity, and to present this Hobson's choice to either the trial judge or the defendant.*

The Probation Act not only authorizes the trial court to suspend execution of sentence and to place the defendant upon probation, but provides that "the court may impose a fine and may also place the defendant upon probation in the manner aforesaid." (U. S. C. Title 18, sec. 724.) Under these provisions, execution of the sentence of imprisonment may be suspended and payment of a fine imposed by the judgment

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* *Cf. Burns* v. *United States*, 287 U. S. 216, 222, in which this Court rejected a construction of the Probation Act which would have limited control of the court over the probationer because "otherwise probation might be more reluctantly granted."

nevertheless may be required of the defendant. *Hollandsworth* v. *United States,* 34 F. (2) 423, 426 (C. C. A. 4); *Campbell* v. *Aderhold,* 36 F. (2d) 366 (D. Ga.). See also *Santis* v. *Esola,* 50 F. (2d) 516, 517 (C. C. A. 9); *Scalia* v. *United States,* 62 F. (2d) 220 (C. C. A. 1).

In such a case, an appeal would unquestionably lie under Section 128 of the Judicial Code. But under the decision of the Circuit Court of Appeals in the instant case, such a judgment of conviction would be a dual judgment, the appeal would be dismissed in so far as taken with respect to the sentence of imprisonment and would be considered only with respect to the imposition of the fine.* The result is a judicial monstrosity. For, if on review in such a case, the court below were held to have committed reversible error, there would be no means of setting aside the judgment of conviction, except as to the fine imposed. We would then be confronted with the spectacle of a person under sentence of imprisonment who could not be tried again without being placed in double jeopardy and who, though held to have been improperly convicted, must nevertheless remain under probation which he must observe to avoid imposition of "any sentence which might originally have been imposed" (U. S. C., Title 18, sec. 725).

d.

This Court has said, in construing another law, "We are not forced by the letter to do violence to the spirit and purpose of the statute" (*Sorrells* v. *United States,* 287 U. S. 435, 448). In the instant case, even the letter of the statute

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* This, precisely, the Circuit Court of Appeals held in the instant case with respect to the appeal from the resentence of the defendant on January 28, 1937.

does not really raise any such conflict. Conflict, if any, arises from the plainly untenable construction of the Probation Act by the Circuit Court of Appeals.

The Circuit Court of Appeals held that the placing of the defendant on probation after imposition of sentence, was not "really a stay" because termination of the suspension was not dependent upon "the occurrence of some outside condition * * * over which the trial judge has no control." This conclusion, it is respectfully submitted, is inconsistent with the decisions of this court in *Burns* v. *United States*, 287 U. S. 216, and *Escoe* v. *Zerbst*, 295 U. S. 490. Certainly, so long as the defendant observes the terms of his probation,—"an outside condition over which the trial judge has no control,"—the defendant's probation may not be revoked. (See, *Hollandsworth* v. *United States*, 34 F. (2d) 423, 427-428.)

The difference between suspension of imposition of sentence and suspension of execution of sentence, has been noted by this Court in *United States* v. *Murray*, 275 U. S. 347, in which Chief Justice Taft wrote, at page 358:

> "The words of the first section (of the Probation Act) important upon this issue are: 'shall have power, after conviction or after a plea of guilty or nolo contendere, * * * to suspend the imposition or execution of sentence and to place the defendant upon probation.' The words mean to suspend the imposition of sentence or to suspend the execution of sentence, and that the placing of defendant upon probation is to follow the suspension of the imposition or the suspension of the execution of sentence, without an interval of any part of the execution. That is a reasonable construction and serves the well understood purpose of the statute."

The Circuit Court of Appeals for the Seventh Circuit has pointed out the difference in *Kriebel* v. *United States, supra*, in the following words:

"The imposition of sentence means laying the sentence upon the defendant, that is, the act of sentencing him; the imposition of a sentence and the execution of it are two different things, and the suspension of one is a different thing from the suspension of the other. It is quite apparent that the suspension of the imposition of the sentence must come before the imposition of it—that is, before sentence—so that to speak of the suspension of the imposition of a sentence after the term at which it was imposed is to use words loosely. The petition in this case did not ask the court to suspend the imposition of the sentence, but to suspend the execution of it; that is, to suspend, or hold back, the act or process of carrying out the sentence" (10 F. (2d) 762, 764).

Although under the Probation Act imposition or execution may be suspended, the following caution given by the Circuit Court of Appeals for the Fourth Circuit in *Riggs* v. *United States*, 14 F. (2d) 5, 9, 10, will doubtless be observed by trial judges in the interest both of justice and efficiency of administration:

"We have accepted the contention of the government that the court had the right to suspend the imposition, as well as the execution, of the sentence. We cannot but feel that the act is susceptible of this interpretation; but in view of the great discretion placed in the District Courts, and the large numbers of persons throughout the country to be affected by its action in administering this act, the suspension of the imposition of sentence will doubtless be rarely availed of, save in cases making that course especially desirable and humane, by reason of affliction, infirmity, sex, or age of the particular offender. It could not have been the policy of Congress, in enacting the law under consideration, to place any greater number of persons than possible in a state of uncertainty as to their personal liberty, and hence this condition will be greatly simplified, and in keeping with the policy in the enforcement of all criminal laws, to have the period for which one is to be punished definitely fixed and known. This can easily be done by prescribing the same upon the conviction, or incoming of a plea of

guilty. The sentence can then be imposed for the time so fixed, with the suspension of probation, or the execution of the sentence, in the discretion of the judge, but in no case for a period longer than five years. The period being once fixed, the terms for which probationers could be held would be well understood, and no question of the right to impose sentence would arise."

The Circuit Court of Appeals for the Fifth Circuit has, without referring to the point in its opinion, rejected the contention that a judgment of conviction was non-appealable, where execution of sentence was suspended and the defendant placed on probation. *Davis* v. *United States,* 55 F. (2d) 550. In that case, appeal was taken from a judgment of conviction on several counts. The defendant was sentenced to serve two years in the penitentiary on the first count and five years collectively on the remaining counts, that term to begin at the expiration of the two-year term. Execution of the five-year term was suspended and the defendant placed on probation as to it. The issue of appealability of the judgment as to the counts on which sentence was imposed but execution suspended during probation, was raised by counsel for the United States, who cited two decisions of the Circuit Court of Appeals for the Second Circuit, *United States* v. *Lecato,* 29 F. (2d) 694; *United States* v. *Messina,* 36 F. (2d) 699,—relied on by the latter court in the instant case. (See *Davis* v. *United States,* brief for United States, p. 25, Aplt.'s reply brief, p. 21.)*

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* In *Aycock* v. *United States,* 62 F. (2d) 612, the Circuit Court of Appeals, precisely the same situation was presented and the court reviewed the appeal as to all counts. The opinion does not advert to the issue of appealability and as the briefs are not available to petitioner's counsel, we are unable to state whether the issue was raised.

The Attorney General of the United States has advised that, for the purposes of appeal, distinction must be made between suspension of imposition of sentence and suspension of execution during probation. In 36 Op. Atty. Gen. 186, 190, Honorable William D. Mitchell wrote as follows:

> "In criminal law the sentence pronounced by the court is the final judgment. *United States* v. *Lecato,* 29 F. (2d) 694; *People* v. *Scott,* 326 Ill. 327; *People* v. *Fisher,* 237 Mich. 504. Until sentence is pronounced there is no final judgment from which an appeal may be taken. *United States* v. *Lecato, supra*; *Commonwealth* v. *Carver,* 224 Mass. 42; *Hill* v. *People,* 10 N. Y. 463; *State* v. *Vaughan,* 71 Conn. 457; *State* v. *Bongiorno,* 96 N. J. L. 318. After sentence has been imposed, even though its execution has been suspended, it is still a final judgment from which appeal must be taken in apt time in order to preserve the defendant's rights thereto. *Sutton* v. *State,* 194 Ind. 479; *Mariano* v. *Hibbard,* 243 Mass. 90."

The Circuit Court of Appeals for the Second Circuit has said of the Probation Act (in *Ackerson* v. *United States,* 15 F. (2d) 268), speaking through Circuit Judge Hough:

> "It seems to us a reasonable conclusion that, since this statute is not pioneer, Congress expected and intended that it should receive at the hands of the courts the same distinctly benevolent interpretaion that most of the state tribunals have accorded to the probation acts of their several states" (p. 269).

More recently, the Circuit Court of Appeals for the Second Circuit has said (in *United States* v. *Lecato,* 29 F. (2d) 694):

> "When Congress passed the Probation Law (18 USCA Secs. 724-727) it must be understood to have intended the system so established to be construed in the same sense as it had been in the states from which it was borrowed, Metropolitan R. Co. v. Moore, 121 U. S. 558, 572, 573, 7 S. Ct. 1334, 30 L. Ed. 1022" (p. 695).

In the *Lecato* case, citation was made of the almost unanimous opinion of the various state courts holding that where imposition of sentence was suspended, there was no judgment and hence, no appeal might be taken. **Yet when, in the instant case, the Circuit Court of Appeals dismissed as "mere matters of form" the distinction between suspension of imposition of sentence and suspension of execution of a sentence actually imposed, the Circuit Court of Appeals chose to disregard the complete unanimity with which state courts which have considered the question, have held that appeal lies where sentence has been imposed and only its execution suspended during probation.** (*Jones* v. *State,* 27 Ga. App. 631, 110 S. E. 33; *Swanson* v. *State,* 38 Ga. App. 386, 144 S. E. 49; *Sutton* v. *State,* 194 Ind. 479, 143 N. E. 353; *Pritchard* v. *State,* 140 Md. 316, 117 Atl. 763; *Kelly* v. *State,* 151 Md. 100, 133 Atl. 899; *Mariano* v. *Hibbard,* 243 Mass. 90, 137 N. E. 369; *People* v. *Robinson,* 253 Mich. 507, 235 N. W. 236; *State* v. *Liliopoulos,* 165 Wash. 197, 5 Pac. (2d) 319.)

Our search has disclosed no contrary authorities. The opinion in *State* v. *Liliopoulos, supra,* exhaustively analyzes and rejects the contention that suspension of imposition of sentence and suspension of execution are one and the same thing. The Supreme Court of Washington considered *Symington* v. *State,* 133 Md. 452, 105 Atl. 541, which it declined to follow, to be the only decision by any court holding that no appeal would lie from the suspension of execution of sentence. As later decisions of the Supreme Court of Maryland show, *State* v. *Symington* turned upon the fact that no sentence was actually imposed, and that the Supreme Court of Maryland holds that where sentence is imposed and execution suspended pending probation, the defendant may

appeal. See *Pritchard* v. *State, supra,* and *Kelly* v. *State, supra.* The Supreme Court of Indiana, in *Sutton* v. *State, supra,* overruled two of its earlier decisions, which, it is interesting to note, rested upon the misreading of Massachusetts and New York cases dealing with appeals where imposition of sentence was suspended or appeal not taken within the statutory period.*

Nor is the following without significance: In *United States* v. *Lecato, supra,* Maryland, Massachusetts and New York decisions, among others, were cited for the proposition that the only judgment in a criminal prosecution is the sentence, and when sentence is suspended, there is no judgment from which to appeal.** In the three named states, alone, of those cited in *United States* v. *Lecato, supra,* does there seem to have arisen the question of whether a substantial distinction exists betwen suspension of imposition of sentence and suspension of execution of sentence, and in all three of those states the distinction has been held to be substantial.

In Maryland and Massachusetts, appeal is allowed where only the execution of the sentence was suspended and the defendant was placed on probation. (*Pritchard* v. *State, Kelly* v. *State, Mariano* v. *Hibbard, supra.*)

In New York also, suspension of imposition of sentence is carefully differentiated from suspension of execution of

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* In three of the cases cited in the text (*Jones* v. *State; Swanson* v. *State; People* v. *Robinson*), the merits of the appeal were reviewed as a matter of course and without discussion of "finality".

** The cases cited (29 F. (2d) 694, 695) were *Hill* v. *People,* 10 N. Y. 463; *People* v. *Bork,* 78 N. Y. 346; *People* v. *Markham,* 114 App. Div. 387, 99 N. Y. Supp. 1092; *People* v. *Flaherty,* 126 App. Div. 65, 110 N. Y. Supp. 699; *Fleet* v. *State,* 21 Atl. 367 (Md.); *Symington* v. *State,* 133 Md. 452, 105 Atl. 541; *Commonwealth* v. *Carver,* 224 Mass. 42, 112 N. E. 481.

sentence, although the question of the right to appeal from a judgment where sentence was imposed but execution suspended was never mooted. The New York courts, which held that they had *inherent* authority to suspend *imposition* of sentence (*People ex rel. Forsyth* v. *Court of Sessions*, 141 N. Y. 288), held that no appeal would lie in such a case. (*People* v. *Markham*, 114 App. Div. 387, 99 N. Y. Supp. 1092; *People* v. *Flaherty*, 126 App. Div. 65, 110 N. Y. Supp. 699). The New York Criminal Code was amended, however, to allow an appeal even in such cases (Sec. 517, as amended by L. 1913, ch. 125).* The amendment is so broadly stated as expressly to permit appeal where *execution* of the sentence is suspended during probation. Nevertheless, power, apart from statute, to suspend the execution of sentence once imposed, was denied in New York (*People ex rel. Hirschberg* v. *Seeger*, 179 App. Div. 792, 166 N. Y. Supp. 913), and the right to allow probation after sentence was not granted by statute until 1918 (See *People ex rel. Woodin* v. *Ottaway*, 247 N. Y. 493, 496-497, 161 N. E. 157).

e.

The decision of the Circuit Court of Appeals is productive of, and in the instant case has resulted in, serious miscarriage of justice. Unless the judgment and sentence of the District Court are reversed, the petitioner will be henceforth subject to the disabilities and disadvantages which flow from such a judgment of conviction. Whenever called as a witness before any court he must answer, if asked, that he stands convicted of a felony. His license to practice

* See also Criminal Code, Sec. 750, as amended by L. 1907, c. 685, relating to appeals from inferior courts.

law has been revoked under the mandatory requirements of subdivision 3 of Section 88 of the New York Judiciary Law, on the ground that he is a person "convicted of a felony", without inquiry into his guilt or innocence (see *Matter of Ackerson,* 218 App. Div. 388, 392, 218 N. Y. S. 564), and, of course, without inquiry as to whether error was committed in the proceedings of the United States District Court. (See *Matter of Patrick,* 136 App. Div. 450, 120 N. Y. S. 1006). Reinstatement to the right to practice law is specifically provided for by the New York Judiciary Law (subd. 4 of Sec. 88) in the case of a reversal upon appeal.

The petitioner is condemned by the decision of the Circuit Court of Appeals to live in a twilight zone between legal life and civil and social death. His sentence has been declared interlocutory in so far as concerns his right to appeal. In contemplation of society, however, it is finality, with inevitable social and economic handicaps and disabilities which necessarily follow from the status of convicted felons. Most certainly, the Probation Act should not be construed in such a manner as to accomplish this result.

Exactly the same situation as is presented by the instant case was reviewed by the Kings Bench of England in *Oaten* v. *Auty,* 2 K. B. 278 (1919). The defendant was charged with failing to appear when called for military duty. He claimed that he came within the exception in favor of "regular ministers of any religious denomination." The trial justices held that he did not establish his exemption and found the offense proved, but dismissed the information under the provisions of the Probation of Offenders Act of 1907, on the ground that it was inexpedient to inflict any punishment. The defendant appealed and the appeal was

allowed by an unanimous court. Darling, *J.*, said, at pages 282-283:

> "If this appellant cannot appeal a grave injustice might be done. At present, he is found to be a person liable to military service, that he refuses to serve, and that he absented himself. That is an offense under the Military Service Acts. As far as we know he is a man of high character and position in this sect, and it is found against him that he is a man who will not do his duty by his country. Why then do the justices not punish him? They say they take advantage of the Probation of Offenders Act, and do not proceed to conviction. For the respondent it is said they have taken a course which prevents the appellant appealing and getting rid of the stigma put upon him. If the stigma has been unjustly put upon him it is not surprising that he desires to come here to get the finding altered, * * *."

A. T. Lawrence, *J.*, wrote, at page 287:

> "They had to determine whether the appellant was really guilty of a grave offence and they proceeded to say that the appellant must be deemed to be enlisted. That surely is a determination of the gravest import to this man's life, and to say that, because they have chosen to add 'we dismissed the information,' no appeal lies, seems to me to look at the mere husk and omit to regard the actual substance of what has been done."

The decision in *Oaten* v. *Auty* exemplifies a canon of the statutory construction laid down in the following language of the Master of the Rolls (afterwards Lord Esher) in *Plumstead Board of Works* v. *Spackman,* L. R., 13 Q. B. 878, 887 (referred to with approval by this Court in *Hawaii* v. *Mankichi,* 190 U. S. 197, 214; see also *Sorrells* v. *United States,* 287 U. S. 435, 446-448):

> "If there are no means of avoiding such an interpretation of the statute," (as will amount to a great hardship), "a judge must come to the conclusion that the

legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended."

II.

The petitioner was entitled to be heard upon the merits of the appeal from the second judgment of conviction entered on January 28, 1937.*

The Circuit Court of Appeals, in affirming the second sentence in so far as it imposed a fine, on the ground that the defendant had "not only consented to it, but actually asked for it", misapplied the decisions of this court relied upon by it. These decisions (*Pacific RR.* v. *Ketchum,* 101 U. S. 289; *U. S.* v. *Babbitt,* 104 U. S. 767; and *Nashville C. & St. L. RR. Co.* v. *U. S.,* 113 U. S. 261) afford no basis for the decision of the Circuit Court of Appeals. Indeed, *United States* v. *Babbitt, supra,* may well serve to illustrate the error into which the Circuit Court of Appeals fell. In that case, the United States had prevailed in the opinion of the Court of Claims, as to the merits, *i.e.,* on the issue of liability of the United States to the plaintiff. The United States had then consented that a judgment be entered, adjudicating that the plaintiff should prevail upon the merits, and then sought

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* This point becomes moot if the judgment of conviction entered on December 29, 1936 is held to be a "final decision", for in that case the Circuit Court of Appeals erred in not reversing the second judgment as entered without jurisdiction. (See p. 8, *ante.*)

to review the judgment by appeal.* In the instant case, on the contrary, the petitioner at no time indicated acquiescence in the central issue of the case, *i.e.*, his guilt or the correctness of the proceedings in the district court. Rather, he complained of the first sentence because it was in such form as possibly to deprive him of the right to a review of the proceedings in the trial court culminating in a judgment of conviction. While he sought modification of the first judgment, he did so only to make more certain his right to have his conviction set aside. Nor was his intention undisclosed; trial judge and prosecutor were fully informed. The trial judge, sharing the petitioner's fears and desiring to assure the right of appeal, resentenced him, again suspending execution of imprisonment and placing him on probation, and imposing a fine.

Upon the facts of the instant case, it cannot be said that the petitioner "consented" to the imposition of any part of the sentence. At no time, not even upon its motion to dismiss the appeals, did the United States even suggest that the petitioner had consented to the judgment of conviction. Counsel for the United States, on the hearing of the application to

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* The judgment was affirmed by this Court. In *Pacific R. R.* v. *Ketchum,* the corporate defendant, in a suit in equity to foreclose a mortgage, confessed all the allegations in the bill of complaint and consented to the form of decree. This court held that the defendant and those standing in the place of the defendant, might not contest the allegations of the complaint nor the propriety of the decree, but could question only the jurisdiction of the trial court. In *Nashville C. & St. L. R. R. Co.* v. *United States,* it was held that a consent decree entered upon the agreement of the parties in a prior action by way of compromise, was binding upon them in subsequent litigation with regard to the subject matter embraced within the decree.

resentence the petitioner though questioning the jurisdiction of the court said: "The Government is equally anxious that the defendant shall have an opportunity to argue the case on the merits in the appellate court * * *" (R. 42) and "I am not against giving him a right to appeal if it can be given in any way" (R. 43).*

Petitioner, in bringing to the attention of the trial judge the situation in which he feared he had been placed by reason of the suspension of execution of his sentence, may be considered at most as having declared that if any sentence might be imposed upon him, which would stand upon appeal, then he would not complain that a fine were additionally imposed. The petitioner is in much the same position as the defendant in *Martin* v. *J. A. Mercier Co.*, 255 Mich. 587, 238 N. W. 181, where a judgment had been obtained by a person injured in an automobile accident, and judgments were permitted to be entered in favor of other persons injured in the same accident, upon the agreement of counsel as to damages, but not as to liability. The Supreme Court of Michigan held that the latter judgments, though entered by consent, were not consent judgments within the meaning of the rule that a judgment or decree entered by consent of the parties, cannot be reviewed by appeal. The consent,

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* The motion to dismiss recognized that the petitioner had not consented to the judgment of conviction (R. 36). By its motion the United States asked, in the alternative, that the first appeal be dismissed on the ground that the first judgment was not final, or, that the second appeal be dismissed on the ground that, a valid appeal having been taken from the first judgment, the district court was without jurisdiction to enter the second judgment (R. 33, 36).

as the Supreme Court of Michigan pertinently observed, must extend to the entire judgment.*

The sentence to be imposed upon a defendant is a matter to be determined in the proper exercise of judicial discretion. "The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function" (*Hill, Warden* v. *United States, ex rel., Wampler,* 298 U. S. 460, 464). It is not a matter of bargain (*Burns* v. *United States,* 287 U. S. 216, 220). The petitioner did not ask mercy and in exchange offer to barter away his right of appeal. Nor was any "bargain" exacted; on the contrary, the trial judge sought to give the petitioner his full day in court. That day he again asked by his petition to this Court.

CONCLUSION.

WHEREFORE, your petitioner respectfully submits that the judgment of the Circuit Court of Appeals for the Second Circuit should be reversed by this Honorable Court, and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

September 17, 1937.

SAMUEL H. KAUFMAN,
Attorney for Petitioner.

SAMUEL H. KAUFMAN,
EMIL WEITZNER,
ISADORE POLIER,
Of Counsel.

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* Compare also, *Grant* v. *U. S. Shipping Board Emergency Fleet Corp.,* 22 F. (2d) 488; *Butte & B. Consol. Mining Co.* v. *Montana Ore P. Co.,* 121 F. 524; *Olmsted* v. *Webb,* 5 App. D. C. 38.

APPENDIX.

Judicial Code, Section 128, as amended by Act of February 13, 1925, C. 229; U. S. C. A., Title 28, Sec. 225.

Appellate jurisdiction—

(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

* * *

Judicial Code, Section 135, as amended by Act of February 13, 1925, c. 229; U. S. C. A. Title, 28, Sec. 230.

Time for making application for appeal or writ of error. No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

Rules of Practice and Procedure, after Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases Brought in the District Court of the United States and in the Supreme Court of the District of Columbia.

Promulgated May 7, 1934.

ORDER.

Pursuant to the provisions of the Act of Congress, approved March 8, 1934, amending an Act entitled "An Act to

give the Supreme Court of the United States authority to prescribe Rules of Practice and Procedure with respect to proceedings in criminal cases after verdict" [Act of February 24, 1933, c. 119, U. S. C., Title 28, Sec. 723a]—

It is ordered on this seventh day of May, 1934, that the following rules be adopted as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases in District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Court of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States.

It is further ordered that these rules shall be applicable to proceedings in all cases in which a plea of guilty shall be entered or a verdict or finding of guilt shall be rendered, on or after the first day of September, 1934.

I. *Sentence.* After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in the Act of March 4, 1925, c. 521, 43 Stat. 1259 [18 U. S. C. A. §§724-727], sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed.

Pending sentence, the court may commit the defendant or continue or increase the amount of bail.

II. *Motions.* (1) Motions after verdict or finding of guilt, or to withdraw a plea of guilty, shall be determined promptly.

(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

(3) A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment.

(4) A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.

III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion.

Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall

set forth the title of the case, the names and addresses of the appellant and the appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and, if the appellant is in custody, the prison where appellant is confined. The notice shall also contain a succinct statement of the grounds of appeal and shall follow substantially the form hereto annexed.

IV. *Control by Appellate Court.* The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail.

* * *

Probation Act. (Act March 4, 1925, c. 521, as Amended June 6, 1930, c. 406, and June 16, 1933, c. 97; U. S. C., Title 18, Secs. 724-728.)

SEC. 724. *Suspension of imposition or execution of sentences and placing of defendant upon probation; power of courts; revocation or modification of probation; duties of*

probationer. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 725. *Same; powers of probation officers; arrest of probationer.* When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

SEC. 726. *Same; probation officers; appointment; compensation; removal; designation and duties of chief probation officer.* The judge or judges of any United States court or courts having original jurisdiction of criminal actions, except in the District of Columbia, may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the judge or judges making such appointments or of their successors. All such probation officers shall serve without compensation except that in case it shall appear to any such judge or judges that the needs of the service require that there should be

salaried probation officers, such judge or judges may appoint such officers. The Attorney General shall fix the salaries to be paid probation officers and shall provide for the necessary expenses of probation officers, including clerical service, and expenses for traveling when approved by the court. Such judge or judges may in their discretion remove any probation officer serving in their respective courts. The appointment of a probation officer shall be in writing and shall be entered on the records of the court or courts of the judge or judges making such appointment, and a copy of the order of appointment shall be delivered to the officer so appointed and a copy sent to the Attorney General. Whenever such judge or judges shall have appointed more than one probation officer he or they may designate one of such officers chief probation officer. Such chief probation officer shall direct the work of all probation officers serving in the court or courts of such judge or judges.

SEC. 727. *Same; duties of probation officers.* It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements

in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. Such officer shall perform such duties with respect to persons on parole as the Attorney General shall request. A probation officer shall have the power of arrest that is now exercised by a deputy marshal.